Supreme Court, U.S.
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No. 95-424

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TURF LAWNMOWER REPAIR, INC. and
JOHN L. GLORIA,

Petitioners,

vs.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN,
MARY ANNE DEMARCO, DAVID HALL
and BYRON CAMPBELL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

PETITIONERS' OPPOSITION TO THE MOTION OF THE NEW JERSEY PRESS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

THOMAS F. CAMPION
Counsel of Record
RICHARD E. BRENNAN
SHANLEY & FISHER, P.C.
Attorneys for Petitioners
131 Madison Avenue
Morristown, New Jersey 07960
(201) 285-1000

QUESTIONS PRESENTED

Petitioners Turf Lawnmower Repair, Inc. and John L. Gloria rely on their previous statement of the Questions Presented.

LIST OF PARTIES

Petitioners Turf Lawnmower Repair, Inc. and John L. Gloria rely on their previous statement of the List of Parties.

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Petitioners Turf Lawnmower Repair, Inc. ("Turf") and John L. Gloria ("Mr. Gloria"), the plaintiffs below, file this brief in opposition to the motion of the New Jersey Press Association ("NJPA") to appear as *amicus curiae* herein. Petitioners oppose the NJPA's motion because it seeks to appear not as a friend of this Court but as an additional advocate on behalf of Defendants/Respondents. For the reasons expressed below,

Petitioners respectfully request that this Court deny the NJPA's motion.

OPPOSITION TO THE MOTION OF THE NEW JERSEY PRESS ASSOCIATION TO FILE BRIEF *AMICUS CURIAE*

I

THE DECISION OF THE NEW JERSEY SUPREME COURT PERMITTING MEDIA DEFENDANTS, BY THEIR CONDUCT AND ACCUSATIONS, THE RIGHT TO CREATE THEIR DEFENSE TO A DEFAMATION SUIT VIOLATES PREVIOUS DECISIONS OF THIS COURT

In arguing that the New Jersey Supreme Court, by its decision below, merely furthered the development of New Jersey's common law, the NJPA ignores the significance of Petitioners' first reason for granting a writ of certiorari. Petitioners argued that the decision below arbitrarily grants media defendants control over the degree of protection that will attach to their speech by permitting them to create their own defense, contrary to previous decisions of this Court recognizing that "[c]learly those charged with defamation cannot, by their conduct, create their own defense by making the claimant a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979); *see Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 167-68 (1979). Applying *Hutchinson* and *Wolston*, the First Circuit wrote that permitting media defendants the right to create their defense and trigger the application of the heightened proof standards is "bootstrapping of the most flagrant sort." *Kassell v. Gannett Co., Inc.*, 875 F.2d 935, 941 (1st Cir. 1989).

In fact, the NJPA's brief is significant only for what it does not say. The NJPA does not and cannot dispute that the effect of the New Jersey Supreme Court's decision is to permit the media to create their own defense. It does not contest that the Petitioners herein were compelled to meet the "actual malice"

standard not because of anything they actually did, but because of the conduct and accusations of the defendants. It ignores the license granted by the New Jersey Supreme Court to the media to create their own defense by its holding that the actual malice standard applies if, examining the article in its entirety and assuming all allegations are true, Respondents have accused Petitioners of unfair consumer practices. (33a). The NJPA simply argues, without any discussion of *Hutchinson* or *Wolston*, that this bootstrapping in an acceptable development of state common law, even though it arbitrarily and capriciously authorizes a distinction in the treatment of defamation plaintiffs solely based on the conduct of the media defendants. Petitioners request this Court to grant the writ and reaffirm the principle announced in *Hutchinson* that defendants "[c]learly ... cannot, by their conduct, create their own defense ...." *Hutchinson*, 443 U.S. at 135.

II

THE NEW JERSEY SUPREME COURT CITED AND MISAPPLIED PRECEDENT OF THIS COURT DEFINING THE ACTUAL MALICE STANDARD

The NJPA does not contest that Petitioners have enough evidence to satisfy the standards previously announced by this Court defining actual malice. Rather, it argues that the New Jersey Supreme Court did not rely on this Court's precedent concerning actual malice, but merely imposed a "state common law standard of fault." (NJPAb12). That the New Jersey Supreme Court relied on federal constitutional law as established by this Court is beyond dispute. Justice Stewart Pollock wrote in his concurring opinion that "I would be less than faithful if I did not express regret about the majority's excessive reliance on federal cases and on the concept of 'actual malice.' If only the Court would look to its own decisions it could solve the present problem *without resort to constitutional principles*." (49a) (emphasis supplied). Justice Pollock's observation is fully supported by the majority's

opinion, in which it, citing *New York Times Co. v. Sullivan*, 376 U.S.254 (1964), wrote that, "To survive a motion for summary judgment, the plaintiffs must establish by clear and convincing evidence that the defendants published the article either with the knowledge that the statements were false or with reckless disregard of whether they were false." (41a). Further, the New Jersey Supreme Court observed that its function in this matter called upon it to balance the "often-conflicting goals of the First Amendment" -- a person's right to reputation against First Amendment expression. (43-44a).

The NJPA makes no effort to contest the quality and quantity of Petitioner's evidence of actual malice. An uncontested sampling of Respondents' fabrication and alteration of facts and quotations, their omission of relevant fact, and their dereliction of professional standards is set forth on pages 16 through 20 of the Petition. Petitioners refer the Court to those uncontested facts, probative on the issue of defendants' knowledge of falsity and reckless disregard of the truth.

III

THE NEW JERSEY SUPREME COURT'S FAILURE TO DISTINGUISH MR. GLORIA'S CLAIM FOR DEFAMATION FROM THAT OF THE CORPORATE PETITIONER VIOLATED HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW

The NJPA again does not challenge the underpinning of Mr. Gloria's argument that the New Jersey Supreme Court violated his rights to due process and equal protection of law by failing to distinguish Mr. Gloria, personally, from the corporate plaintiff. In the Petition, Mr. Gloria noted that the Respondents had not accused him, personally, of any conduct violative of the New Jersey Consumer Fraud Act. Merely because Mr. Gloria owned Turf, Respondents filled their report with invective, demonstrably not in the public interest, that Mr. Gloria was petty, vindictive, dishonest, and unethical. The NJPA offers no explanation of how the so-called public interest angle of the article -- the unmasking of Turf to the

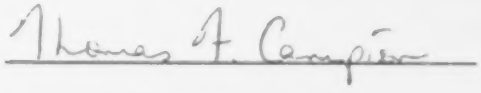
consuming public -- was advanced by this biting, sensational and ultimately false attack on Mr. Gloria. All the consuming public needed to know, in order to be informed, was that, in the Respondents' opinion, Turf's services were deficient.

It is remarkable that the media comes before this Court and requests a license not only to destroy the reputation of a small business, but the right to bootstrap the owner of the business to the report and then to level a gratuitous personal attack on him that advances *no* alleged public interest. The NJPA is speechless to explain why the public needed to know anything about Mr. Gloria's personal life or attributes. Its silence is telling: the public had no need to know. Respondents, like other media, grasped for the sensational to make their story more exciting and to sell more papers. In this instance, the First Amendment should afford no protection of the "actual malice" standard as, with respect to Mr. Gloria, his personal right to reputation obviously outweighed Respondents' alleged right to crass sensationalism and commercial sales.

CONCLUSION

For all the foregoing reasons Petitioners respectfully request the Court to issue a writ of certiorari to review and reverse the decision of the New Jersey Supreme Court, and to deny the motion of the New Jersey Press Association to file a brief *amicus curiae*.

DATED: Morristown, New Jersey.
October 27, 1995.



THOMAS F. CAMPION
RICHARD E. BRENNAN
Counsel of Record for Petitioners
SHANLEY & FISHER, P.C.
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(201) 285-1000